Supreme Court, U. S.
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No. 80-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER HOWELL,
Petitioner,

vs.

CITY OF BIRMINGHAM,
A Municipal Corporation,
Appellee/Respondent

[redacted] DENY PETITION FOR WRIT OF CERTIORARI TO REVIEW THE OPINION AND JUDGMENT OF THE ALABAMA COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

I.

Is the constitutional right to a jury trial satisfied by a two-tier court system?

II.

Is the constitutional right of trial by jury mandated in trials for violation of city ordinances in municipal courts?

III.

Was the City of Birmingham Ordinance 16-18, as amended, systematically and selectively enforced or administered by the public authority of said City against Walter Howell with an evil eye and unequal hand which resulted in an unjust, illegal, intentional discrimination against him as compared with other persons in similar circumstances, thereby violating his right under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America?

IV.

Do either the double jeopardy provision or the equal protection clause of the United States Constitution impose an absolute bar to a more severe sentence upon reconviction?

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MOTION TO DENY PETITION FOR WRIT OF CERTIORARI TO REVIEW THE OPINION AND JUDGMENT OF THE ALABAMA COURT OF CRIMINAL APPEALS

The Appellee/Respondent respectfully prays that the Writ of Certiorari be denied Petitioner for review of the opinion and judgment of the Alabama Court of Criminal Appeals entered against him on January 22, 1980.

OPINIONS BELOW CITED BY PETITIONER THAT APPEAR ERRONEOUS

The original opinion appearing on Appendix A.1 of Walter Howell's Petition apparently did not contain *Rehearing Denied February 26, 1980* because it was decided subsequently as set forth at A.5. (emphasis added)

Under A.1, I my copy of the Court's opinion read 6 Div. 38 (Ms. December 4, 1979) not 380 So.2d 990 (1979), likewise under A.2, II read 6 Div. 840 (Ms. Oct. 16, 1979) and not 377 So.2d 1131 (1979).

On A.3, fourth paragraph, fifth line after the word *to* the following words were apparently omitted — *their feelings about the imposition of.* (emphasis added) Also at A.3, fifth paragraph, fifth line, the number *82* was apparently omitted before So. (emphasis added)

JURISDICTION

This Court's jurisdiction *may* be invoked under Title 28 U.S.C.A. §1257(3). (emphasis added)

The following portion of United States Supreme Court Rule 19 is material to the pending case. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The issues raised by the Petitioner do not in the opinion of the writer present new questions for the first time nor present any special or important reason for granting a writ of certiorari. It appears that this case is not one of first impression and that the following quotation is applicable:

> "A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is a 'case of first impression.' People v. Pestronk, 157 N.Y.S.2d 492, 493, 3 Misc.2d 845."

STATEMENT OF THE CASE

The body of the complaint read as follows:

> "Comes the City of Birmingham, a municipal corporation and complains that Walter Howell, within twelve months before the beginning of this prosecution, on to-wit: April 12, 1978 and within the City of Birmingham, or the police jurisdiction thereof, at to-wit: Tomkat Theatre, 9221 Todd Drive, did knowingly and unlawfully exhibited at the aforesaid location to R. A. Bowden an obscene motion picture, film or matter with leader titled or entitled, to-wit: "Honeypie," which portrayed the following sexual conduct: Actual act or acts of sexual intercourse, fellatio, cunnilingus contrary to and in violation of Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended."

According to the transcript, the Petitioner's trial began in the Circuit Court on September 20, 1978 rather than September 30, 1978 as he alleged.

On April 12, 1978 Officer Bowden was instructed to make a random check of the movie houses in Birmingham. (T. p. 21) He went to the Tomkat Theatre in the City of Birmingham, (T. p. 19) purchased a ticket from Mr. Howell for Four Dollars and saw no other employees. (T. p. 22) The officer saw the movie "Honeypie" from beginning to the end. (T. pp. 23-24) Walter Howell was conducting a one man operation. (T. pp. 26, 99) He sold tickets, loaded and unloaded the projector. (T. pp. 99, 100)

Judge Hall, the Municipal Judge who issued the arrest and search warrant, was not required to view the film prior to issuing said warrants as provided for in Section 16-27 of Ordinance No. 77-244. A copy of Sections 16-27 and 16-28 is attached as Appendix A.

At page 6, paragraph 1, Walter Howell referred to the issue of an adversay hearing, yet did not raise it in his questions

presented for review. Therefore, since he did not merit listing it as an issue, it will be disregarded. Further, no supporting law was found by Appellee/Respondent.

At page 6, paragraph 2, Walter Howell apparently makes no distinction between the two different and distinct classes of sexual conduct, actual and simulated. The City contends that a clear distiction exists as evidenced by the contents of the film "Honeypie" as compared with nudes and simulated sex acts.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

No new substantial constitutional questions are presented.

I.

The right to a trial by jury is satisfied by the two-tier court system. *Ludwig* v. *Massachusetts,* 96 S.Ct. 2781 (1976) at page 2781 said:

> ". . . The Supreme Court, Mr. Justice Blackmun, held that the Massachusetts two-tier court system does not deprive an accused of his Fourteenth Amendment right to a jury trial and does not unduly burden that right; the Court further held that the Massachusetts procedure does not violate the double jeopardy clause of the Fifth Amendment as it is made applicable to the states by the Fourteenth Amendment."

II.

The constitutional right of trial by jury does not extend to trials for violation fo city ordinances in municipal courts.

Costello v. *Flagin,* 169 Ala. 191, 50 S. 134

Ex Parte State ex rel City of Birmingham, 164 Ala. 576, 51 So. 309

City of Birmingham v. *Williams,* 229 Ala. 101, 155 So. 877

Donahey v. *City of Montgomery,* 43 Ala.App. 20, 178 So.2d 832

Sec. 12-14-6, Code of Alabama 1975

Birmingham v. *Evans,* 53 Ala.App. 358, 300 So.2d 396

Ex parte Hall, 255 Ala. 98, 50 So.2d 264

Hawkins v. *City of Birmingham,* 380 So.2d 994

Holderfield v. *City of Birmingham,* 380 So.2d 990

Howell v. *City of Birmingham,* Ala.Ct.Crim.App. 6 Div. 916 (Ms. January 22, 1980)

In *Coble* v. *City of Birmingham,* Ala.Ct.Crim.App., 6 Div. 94 Ms. June 30, 1980, page 10, the Court said:

> "While the jury system may be the best method for determining obscenity as defined in Miller v. California, [413 U.S. 15], it is not a constitutional requirement. The statute requiring that all cases in municipal courts shall be tried by a judge without a jury is not unconstitutional as it applies to an obscenity prosecution in the municipal court."

State v. *Luck,* 353 So.2d 225, cited by Petitioner at page 10 does not appear to be applicable to the case at bar because (1) It was a state prosecution rather than municipal; (2) The penalty imposed by L.A.R.S. 14-106 G (a fine of not less than $100 nor more than $1000 or imprisonment in the parish prison for not more than one year or both) entitled the defendant to a jury trial. The potential penalty in *Luck* far exceeded the City's maximum fine of $500, or imprisonment in the City jail not exceeding six months or both.

Duncan v. *La.,* 391 U.S. 145, 88 S.Ct. 1944, held in offenses where the sentence is six months or less the right to jury trial may be constitutionally denied. Further, Sec. 12-14-6, Code of Alabama, 1975, and all the cases cited have addressed this question.

Section 12-14-6, Code of Alabama 1975 states:

> "All cases in municipal courts shall be tried by a judge without a jury." (Acts 1975, No. 1205, §8-101)

It is well established in this state that a prosecution for a municipal offense is a quasi-criminal proceeding and that, as a general rule, constitutional and statutory provisions, having

reference to criminal prosecutions by the state, are not applicable to violations of municipal ordinances. *McKinstry* v. *City of Tuscaloosa,* 172 Ala. 344, 54 So. 629.

In a habeas corpus petition (involving another obscenity conviction) the issue of the failure to provide a jury trial in the municipal court was raised. The petition was denied. *Henry P. Starley, Petitioner* v. *William R. Myers in his capacity as Chief of Police of the City of Birmingham, Alabama, Respondent.* The United States District Court for the Northern District of Alabama, Southern Division (Ms. June 24, 1980).

At page ten of Walter Howell's petition he refers to *Darby* and repeats the question, "Does the First and Fourteenth Amendments require that questions of obscenity be decided by a jury?" He concludes that since this Court denied the Kansas City's appeal it strongly suggests it does. The Appellee/Respondent would suggest that the *law,* not inferences and suggestions *control.* (emphasis added)

Further at page eleven, last paragraph, Walter Howell stated Alabama stands alone as far as he can determine in not requiring jury trials in obscenity prosecutions at the municipal court level. It appears by citing only (Missouri & Minnesoto) that his position is obviously the minority one and not the State of Alabama.

III.

With reference to the alleged conscious, intentional discriminatory enforcement of the obscenity ordinance by the City against Petitioner, the petition referred to the case of *Simonetti* v. *City of Birmingham,* 55 Ala.App. 163, 314 So.2d 83, (1975). The City agrees that this case is material and that the following quotation at page 92 is a correct statement of the law.

> "All the cases recognize that a heavy burden rests on the defendant to establish conscious, intentional

discrimination, but if successful in sustaining that burden, the defendant will be entitled to a dismissal of the prosecution as a matter of law."

The City contends this heavy burden has never been met by the Petitioner.

There are many cases dealing with the question of discriminatory enforcement of the law. The vast majority have concluded that to sustain a claim of discriminatory enforcement there must be evidence of intentional or purposeful discrimination. The universal way of establishing such is by proof that the enforcement is by race, religion or some other improper classification or as the result of some other ill-motive such as possibly to embarrass a political candidate or punish an enemy. In all cases the issue is the pattern of enforcement. The following citations all adhere to the above stated propositions of law:

1. *Oyler* v. *Boles,* 368 U.S. 448, 82 S.Ct. 501;
2. *Snowden* v. *Hughes,* 321 U.S. 1, 64 S.Ct. 397;
3. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 6 S.Ct. 1064;
4. *People* v. *Wegman's Food Market, Inc.,* 362 NYS2d 902;
5. *People* v. *Lofton,* 366 NYS2d 769;
6. *Goodman* v. *Kennedy,* 329 A2d 224;
7. *Mulhern* v. *McHenry,* 326 A2d 132;
8. *Gutknecht* v. *City of Sausalitio,* 117 Cal.Rptr. 782;
9. *People* v. *Dobbs Ferry Medical Pav. Inc.,* 332 NYS 168;
10. *State* v. *Solomon,* 254 S.C. 550, 141 SE2d 818;
11. *People ex rel Moylan* v. *Kur,* 350 NYS2d 990;

12. *United States* v. *Elliott,* 266 F.Supp. 318;

13. *State* v. *Deddens,* 542 P2d 1124;

14. *People* v. *Thomas,* 542 P2d 387;

15. *People* v. *Plamondon,* 236 NW2d 86;

16. *United States* v. *Brookshire,* 514 F2d 786.

Assuming arguendo that Walter Howell has carried his heavy burden and presented evidence which created a strong inference of discriminatory prosecution, then the government according to *Associated Industries of Alabama* v. *State,* 314 So.2d 879, 55 Ala.App 277, is required to explain it away, if possible, by showing the selection process rested upon some valid ground. This the City of Birmingham has also done. The transcript and City's Exhibit #1, each prove that the arrests made by the City involved subject matter containing actual sex acts, or obscene matter (not nudes or simulated sex).

At pages 17 and 23 Walter Howell quoted *Sunday Lake Iron Co.* v. *Wakefield,* 247 U.S. 350, 38 S.Ct. 495. Omitted, however, was the following sentence found at page 495, "The good faith of such officers and the validity of their actions is presumed; when assailed, the burden of proof is upon the complaining party." Appellee/Respondent contends that transcript evidences the fact that Walter Howell has not met his burden of proof.

At page 17 *People* v. *Utica Daw's Drug Co.* was referred to by Walter Howell. It is also expressed at 225 NYS2d at p. 136, "...It is only when the selective enforcement is designed to discriminate against the persons prosecuted without any intention to follow it up by general enforcement against others that a constitutional violation may be found." The Appellee/Respondent agrees with this proposition of law which it contends is supported by the transcript in that there was no discrimination against the person prosecuted and there was a general enforce-

ment against others in his class (those allegedly selling or exhibiting obscene matter which depicted actual sex acts).

The City denies Walter Howell's allegation of intentional discriminatory enforcement by Officer Bowden. His instructions were to make a random check of the movie houses in Birmingham and to see if there were any violations concerning obscenity laws.

The Birmingham Police Department did not exercise prosecutional discretion by arresting Walter Howell nor was this section of the City Code enforced against him based on an unjustifiable standard such as race, religion, or other arbitrary classification. A movie was viewed by Vice Officer Bowden, but his superiors neither ordered him to view this particular movie nor to arrest a certain individual.

No evidence of any intentional discrimination against Walter Howell has been proven by him. To show that the police are discriminating the defendant has the burden, inter alia, to show that constabulary are acting with malice toward him. See *People* v. *Utica Daw's Drug Co.*, 16 A.D. (1963)2d 12, 225 NYS2d 123, and *Two Guys* v. *McGinley,* 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1962). That burden Petition has not satisfied. *He is entitled to equal protection of the law, not protection from the law.* (emphasis added)

Central to his alleged discriminatory enforcement attack is the applicability of *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886) and *Oyler* v. *Boles,* 368 U.S. 448 (1961). The provisions of Birmingham's obscenity ordinance did not facially violate Walter Howell's constitutional rights. As set forth in *Oyler* v. *Boles,* supra, the Court recognized the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.

It is permissible for law enforcement officials to select "test" or "notoriety" cases for prosecution. There are always those

who escape prosecution. Here, Walter Howell's *evidence has not met the heavy burden* of proving *unequal enforcement by city officials* - that the obscenity laws have not been enforced equally against all violators with the same intensity as against him. Moreover, assuming arguendo, a disparity of treatment between Petitioner and others similarly situated, he has not demonstrated that this difference in enforcement is based upon a decision to enforce the law against him because of any improper motive. (emphasis added)

The burden of explanation should not be shifted to the City of Birmingham. The Petitioner should first establish a *prima facie* case of discrimination. More than mere unequal enforcement is required to constitute discrimination of the sort condemned as unconstitutional in *Yick Wo*. For the unequal enforcement to be discriminatory against any defendant, he must show either that the disparity is based upon some constitutionally impermissible standard, such as race, religion, or other arbitrary classification. This Petitioner has not done.

At page 24, Petitioner cited *John F. Lawhon Furniture Company* v. *Melvin Bailey* (D.C. Ala. CA 72-1109) a Blue Law case, but failed to quote Honorable Sam C. Pointer, Jr., FINDING OF FACT AND CONCLUSION OF LAW:

> "I'm persuaded that there is no intentional wrongdoing on the part of the Sheriff's Department in the sense of any willful intent to pick out Lawhon to the exclusion of others.
>
> I'm also persuaded and convinced that there has been unequal enforcement by the sheer practicalities involved, that in fact the stores have not all been treated the same. I think it is understandable that with a lawsuit in which Lawhon has been involved, suing the Sheriff's Department and which it has made advertisements when it was going to be open on Sunday, it is very logical and understandable why the Sheriff's Department, with the red flag waved

> before it, would respond and make arrests when Lawhon opened on Sunday. Twice that has happened during the period in question this year."

In the present case, as in *Lawhon,* there was no intentional wrongdoing by the Birmingham Police Department. Further there is no evidence that a lawsuit had been filed by Petitioner against the Birmingham Police Department nor did he advertise he would continue to operate the Tomkat Theatre. The Petitioner did not wave a red flag at the Birmingham Police Department, nor was there any unequal enforcement by the City in his case based on any practicalities involved.

The jury found the movie "Honeypie" to be obscene. The City contends this placed Walter Howell working in a class of theatres allegedly exhibiting matter explicitly depicting the performance of actual sex acts and was in violation of the obscenity ordinance as charged, prosecuted and convicted. The subject matter met the guidelines or elements as set forth in *Miller* v. *California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1974).

The law as set forth in *Miller* was satisfied when there was depicted in the film actual sexual acts between individuals, but this is not true regarding the magazines offered for sale at other stores in Birmingham which contained pictures of nude bodies and simulated sexual activities. When there is a jury trial in the Circuit Court, the jurors have not only the right but the duty to determine if the matter in issue is obscene and convict if the evidence so warrants, and that is exactly what they did in this case and assessed the maximum fine of $500.00.

In his petition on page 17, *Snowden* v. *Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, was cited which *admits* the City of Birmingham's contention that the *heavy burden rests on the defendant to establish conscious, intentional discrimination.* (emphasis added) The Appellee/Respondent contends again this burden was never met by Walter Howell.

As long as the enforcement is not designed to discriminate against a particular individual in a particular class it would not be held discriminatory. If an act cannot be enforced equally, it would be facially void. No proof has been adduced establishing an evil motive on the part of the City resulting in this code section being discriminatorily applied to Walter Howell.

IV.

Neither the Fifth Amendment to the U.S. Constitution (Double Jeopardy) nor the Equal Protection Clause of the U.S. Constitution (Fourteenth Amendment) rights of Walter Howell were violated in this case. No evidence of vindictiveness on part of the trial judge existed. Walter Howell elected to appeal his case to the Circuit Court and the jury found the film "Honey Pie" to be obscene and assessed the maximum fine — $500. The trial judge likewise imposed the maximum hard labor sentence of one hundred eighty days, which was commensurate with the evidence and fine. The transcript affirmatively substantiates the fact that the trial judge was not aware of Walter Howell's prior record in the Birmingham Municipal Court and, therefore, could not and did not influence the hard labor sentence imposed. (T. p. 151)

The statistical information obtained by Defendant's counsel and his law associate found at A.13 - A.15 (Appendix E) has been dealt with as set forth in the last paragraph of the Alabama Court of Criminal Appeals opinion dated January 22, 1980 and found at page A.4 of Walter Howell's petition. It adequately deals with this issue and cites the pertinent law. In addition, at pages 137 - 142 of the transcript the record reveals apparent errors in Walter Howell's quotations at A.13, 1 & 2, A.14, 8 & 8a:

Figures Apparently Erroneous	Correct
1. 316 cases appealed... 62 cases were nol/prossed or appeal dismissed, leaving 263 cases	323 cases appealed... 60 cases were nol/prossed or appeal dismissed, leaving 254 cases
2. of the 254 cases:	of the 263 cases:
8. of 193 consent cases	of 220 consent cases
8a. 152 defendants	188 defendants

Also at p. 140 of the transcript Walter Howell's petition failed to mention the case involving a Driving While Intoxicated case in April of that year where the municipal court fine had been $200 and fifteen days. The jury verdict in the Circuit Court was a $350 fine and the Court added 150 days in this case where a man was killed. In light of this case and the one at bar it is apparent that the hard labor imposed by the Court in each case was equal to the gravity of the offense.

At page 30, Walter Howell referred to the subject of probation and makes a comparison between murder and obscenity cases. A motion for reduction of jail sentence was made by Walter Howell in the Circuit Court to equal the sentence at the Municipal Court level but Appellee/Respondent finds no prayer for probation therein. Further, since it does not appear to be material and was not cited as an issue no discussion appears necessary.

The jury made the determination after viewing "Honey Pie" that it was obscene, found the Petitioner guilty as charged and further assessed the maximum fine of $500.00. The Court then assessed the maximum hard labor (180 days). It was in keeping with and warranted by the evidence, with the guilty verdict, and with the maximum fine imposed.

CONCLUSION

For the foregoing reasons, Writ of Certiorari should be denied the Petitioner by this Court to review the opinion and judgment of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

Section 16-27. Testimony of persons as to obscenity of film.

Any police officer of the city or other individual who shall accuse any person of publicly exhibiting in the city or its police jurisdiction an obscene motion picture in violation of section 16-18 or any other ordinance or law of the city may appear before a municipal judge and testify under oath to the facts upon which he bases such accusation, giving a full description of the conduct depicted in the motion picture taken as a whole. Such police officer or other individual may also offer in evidence before such municipal judge exhibits, together with the testimony of any other person on any issue relevant to whether such motion picture is obscene or whether the accused person is guilty of exhibiting it in public. All such testimony shall be reduced to writing in affidavit form and sworn to by the person making the same. The municipal judge, if undecided from affidavits and exhibits, if any, that such motion picture is obscene, may view such motion picture if it is then being publicly exhibited in the city or its police jurisdiction, and the director of finance of the city may reimburse such municipal judge for any cost of admission and transportation incurred in viewing such motion picture.

In the event such municipal judge is not allowed to view such motion picture by the person exhibiting the same, by refusing to sell a ticket of admission or by stopping or discontinuing the exhibition of such film, or otherwise preventing his viewing the same, the municipal judge shall proceed as if he had viewed such motion picture in accordance with section 16-28.

Section 16-28. Warrants for seizure of film and arrest of person exhibiting same.

If a municipal judge determines from any affidavit or exhibit, or both, or from his viewing such motion picture, or his prevention from viewing the same as described in section 16-27, that there is probable cause to believe such motion picture is obscene, he shall proceed to issue a search warrant for the seizure of such motion picture film and a warrant for the arrest of the person accused before him of publicly exhibiting the same in violation of section 16-18 or any other applicable ordinance or law of the city.